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NO. 87-750

# In the Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF RESPONDENTS ERNESTO SERIO PAMPIN LOPEZ et al IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE.....1

REASONS WHY THE WRIT SHOULD BE DENIED.....6

1. Even were this Court to grant the writ and reverse the Fifth Circuit it would have no effect in this case since plaintiffs are entitled to enforce their valid judgments against the United States.....6

   The Fifth Circuit's decision does not establish a new prerequisite to the invocation of the doctrine of *forum non conveniens* or reduce its utility, nor does the decision conflict with any rule of law articulated by the Sixth Circuit.

2. The resolution of the conflict between the Fifth Circuit and Second Circuits and the District of Columbia Circuit with regard to effect of an air carriers failure to comply with the notice requirements of the Montreal Agreement is irrelevant to the outcome of the case before this Court since there are valid judgments against the United States, whose liability is not limited by the Warsaw Convention.....12

## TABLE OF AUTHORITIES

**CASES:** **Page**

*Calavco Growers of California v. Generali Belgium*, 632 F.2d 963 (2nd Cir. 1980).....8,11

*Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).....9,10

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).....7,8,9

*In re: Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987).....12

*In re: Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985).....12

*In re: Air Crash disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir. 1987).....12

*Lisi v. Alitalia-Linei Aeree Italaliane*, 370 F.2d 508 (2d Cir. 1966).....13

*Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 85 (2d Cir. 1965).....13

*Piper Aircraft v. Reyno*, 454 U.S. 233 (1981).....7,8,9

*Syndicate 420 at Lloyd's London v. Early American Insurance Co.*, 796 F.2d 821 (5th Cir. 1986).....8

*Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).....13

*Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354 (6th Cir. 1985).....8,9,11

STATUTES:

28 U.S.C.A. Sections 2671-72, 2675.....2

RULES:

Local Rule 35 (5th Cir.).....4

## TABLE OF AUTHORITIES (continued)

Page

TREATIES & AGREEMENTS:

Convention for the Unification of Certain Rules Relating to the International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. app sec. 1502 (1982).....passim

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900 approved by CAB Order E-23680, May 13, 1966, Docket 17235, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. app. sec. 1502 (1982).....passim

MISCELLANEOUS:

15 Federal Practices & Procedures, Wright, Miller & Cooper, sec. 3928.....11

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).....13

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## PRELIMINARY STATEMENT

Respondents, Ernesto Serio Pampin Lopez et al, respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied, and the cause should not be reviewed by this Court. In support of this submission, respondent files this Brief in Opposition pursuant to this Court's Rule 22.

## STATEMENT OF THE CASE

Respondents are the relatives of foreign passengers killed when Pan Am Flight 759 crashed shortly after take-off from New Orleans International Airport in Kenner,

Louisiana on July 9, 1982. All are citizens of Uruguay.

They along with other Uruguayan citizens, filed suit in the United States District Court for the Eastern District of Louisiana, naming as defendant Pan Am. They also filed claims against the United States government under the Federal Tort Claims Act, 28 U.S.C. secs. 2671-72, 2675. Once those claims were denied, the original complaint was amended to add the United States as a defendant.

As Pan Am points out in its petition, it moved to dismiss these foreign plaintiffs' cliams based on the discretionary doctrine of *forum non conveniens.* (Pet. p. 3). Since the accidents happened in Kenner, Louisiana, and since it was clear that the United States would be a party, the trial court denied Pan Am's motion, and ruled that the cases would be tried in the forum in which they had been brought.

The United States did not seek relief in this regard. It did not move for *forum non conveniens* dismissal. It did not join Pan Am when it reurged its motion at various stages of the litigation or advise the district court that it intended to seek relief by way of a stay of the proceedings if the claim against Pan Am were dismissed.

Discovery was conducted in Uruguay, where the plaintiffs and their spouses were deposed, and where many documents were produced in response to defendants' requests.

Prior to the trial the district court ruled that Pan Am could not invoke the limitation of liability provision of the Warsaw Convention as modified by the Montreal Agreement since it had not complied with the requirements for notice of the limitation spelled out in the Montreal Agreement. Specifically, the tickets issued to respondents' relatives were not printed in 10-point type as required by the Montreal Agreement.

The United States, petitioner and respondents entered into a stipulation in which both Pan Am and the government agreed not to contest their liability for compensatory damages. (Pet. App. 48a).

Pan Am and the United States appeared and defended the cliams on the issue of damages only. The two cases were tried to verdict in a total of three days. As in other cases arising from this disaster, regardless of the plaintiff's citizenship, Pan Am limited its defense to cross-examination of plaintiffs and their witnesses.[1] The jury rendered a verdict against Pan Am and the government; judgment consistent with that verdict was entered on August 30, 1984. (Pet. App. 97a-99a).

Both defendants appealed the judgment citing eight assignments of error in addition to the two set out above.[2]

A panel of the Fifth Circuit Court of Appeals affirmed the district court's denial of Pan Am's motion to dismiss on the ground of *forum non conveniens,* finding that the court had not abused its discretion in refusing to grant the motion. The panel also affirmed the trial court's ruling that Pan Am was not entitled to a limitation of its liability since it had not complied with the requirements of the Montreal Agreement.[3]

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[1] In cases involving future economic loss Pan Am did call experts to testify in its behalf.

[2] Since the United States and Pan Am were represented by the same attorneys at trial and on appeal, it is not clear from the appellate brief what assignments of error the government joined. However, while the other errors were applicable to the government, it had neighter sought nor was entitled to relief in the trial court on the limitation or *forum non conveniens* issues.

[3] The panel affirmed the judgment in part, vacated in part, and granted remittitur or new trial as to certain of the damage awards to plaintiffs. See Pet. App. p. 81a-96a.

Pan Am requested rehearing *en banc* to review the panel's decision on the *forum non conveniens* issue.[4] The Court granted the petition, vacating the panel's opinion and judgment. Fifth Cir. Loc. R. 35. The *en banc* opinion addressed the *forum non conveniens* issue raised by Pan Am at length and found that the district court had not abused its discretion by refusing to dismiss the plaintiffs' claims. The Court then reinstated the panel's holdings without comment, finding no other isues in the case worthy of *en banc* discussion. (Pet. App. p. 42a-43a)

a. *Forum Non Conveniens. The Court of Appeals, sitting en banc,* determined that the United States, one of two named defendants, had not consented to the jurisdiction of Uruguay. Therefore, the only forum available to the plaintiffs that would allow them to pursue their claims against all defendants was the United States.[5]

The Fifth Circuit found that the trial court had correctly concluded that there was no alternative forum available, and had not abused it discretion by not proceeding to the balancing of the private and public interest factors.

The United States was not amenable to suit in Uruguay, and neither joined nor supported Pan Am's *forum non conveniens* motion. The cases proceeded to trial with the government and Pan Am as defendants, and

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[4] The government did not join the Suggestion for Rehearing *En Banc*.

[5] No defendant approached plaintiffs in Uruguay offering to stipulate to liability and agreeing to waive any objections to that country's jurisdiction. It was not until the anniversary date of the crash had passed that Pan Am informed plaintiffs' counsel of its proposed stipulation. Had plaintiffs not come to the United States to pursue their claims, but waited for the stipulation to determine if defendants were amenable to suit in thier home country, the cases would have been time barred by Louisiana's one year statute of limitations.

judgment was entered against Pan Am and the United States. The government could not and did not appeal the trial court's denial of Pan Am's motion. The judgments against the government are final. Pan Am and the United States have agreed to apportion any judgments between them. Therefore, the issues raised by petitioner is moot.

Pan Am seeks to entice this Court to grant the writ and formulate a rule of law favorable to its position in future cases involving the doctrine of *forum non conveniens*. Even were its reasons for granting the writ valid, this is not the proper case in which to consider the issue.

Contrary to petitioner's argument, the *en banc* decision of the Fifth Circuit neither establishes a "new" prerequisite to the invocation of the doctrine of *forum non conveniens* nor reduces its utility. Nor does the Fifth Circuit's holding conflict with any rule of law articulated by the Sixth Circuit.

b. *The Limitation of Liability.*

The panel affirmed the District Court's finding that Pan Am was not entitled to limit its liability to a maximum of $75,000.00 for the death of these international passengers, finding that the notice of limitation printed on the tickets did not comply with the notice requirement spelled out in the Montreal Agreement. The panel rejected Pan Am's argument that its failure to comply with the letter of the notice requirement of the Agreement did not preclude its availing itself of the treaty limitation. In doing so, the Court adopted the reasoning of the Second Circuit.

Although the District of Columbia Circuit reached a different result, adopting a district court opinion that rejected the Second Circuit's reasoning, the issue does not merit consideration by this Court. Even were Pan Am

entitled to avail itself of the limitation, despite its failure to comply with the requirements of the Montreal Agreement, the treaty limitation does not affect the government's liability. Full damages may be recovered from the United States.

Pan Am and the government have entered an agreement apportioning the damages between them so that even were this court to grant *certiorari* and determine that the limitation is applicable it would have no effect in this case.[6]

## REASONS WHY THE WRIT SHOULD BE DENIED

1. Even were this Court to grant the writ and reverse the Fifth Circuit it would have no effect in this case since plaintiffs are entitled to enforce their valid judgments against the United States.

   The Fifth Circuit's decision does not establish a new prerequisite to the invodation of the doctrine of *forum non conveniens* or reduce its utility, nor does the decision conflict with any rule of law articulated by the Sixth Circuit.

The United States was a party to this litigation. It stipulated liability. It did not join or support any of Pan Am's several motions requesting that the district court

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[6] Pre-judgment interest as to Pan Am, but not the United States, is available under Louisiana law. A favorable decision by the Court on this issue could result in a slight reduction of the total award. It is respectfully suggested, however, that this fact does not justify consideration by this Court.

decline to exercise its jurisdiction.[7] It defended the cliams herein on the issue of damages only, and was cast in judgment. It did not raise the *forum non conveniens* issue on appeal or join Pan Am's Suggestion for *En Banc* Reconsideration. The judgment against it is final. Even were this Court to agree with petitioner that this issue merits its consideration, and reverse the Fifth Circuit, plaintiffs will be entitled to execute on the judgment against the United States. Therefore, the issue is moot, and, for this reason alone, the writ should be denied.

However, petitioner's arguments in favor of granting the writ are without merit. Petitioner's first assertion is that the Fifth Circuit decision has added significantly to the threshold requirements to the invocation of the doctrine of *forum non conveniens.* A review of the cases does not support this assertion.

As early as *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) this Court recognized that the doctrine of *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process. *Id.* at 507. This principle was reaffirmed in *Piper Aircraft v. Reyno,* 454 U.S. 233, 254, n. 22 (1981).

Although this Court has never considered whether the threshold requirement is met where all defendants are

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[7] Petitioner suggests that a defendant who is not amenable to process in the foreign jurisdiction, such as the United States, could seek a stay of the proceeding if the cliams against its co-defendant are dismissed for *forum non conveniens.* Pet. p.14, n. 9. The fact remains that the governme..t did not join or support Pan Am's motion, nor did it seek a stay or advise the trial court of its intention to do so if Pan Am's motion were granted. Speculation as to what the goevernmet might have done does not entitle it to relief. Had Pan Am's motion been granted, plaintiffs, having a stipulation of liability by the United States and jurisdiction of this solvent defendant in its chosen forum, may have elected to dismiss its claim against Pan Am and proceed against the United States only.

amenable to suit in plaintiff's chosen forum but one or more is not subject to the jurisdiction of the foreign forum, other courts have assumed that this requirement presupposed at least two forums in which all defendants were amenable to process. *See, Syndicate 420 at Lloys's London v. Early American Insurance Co.*, 796 F.2d 821, 818 (5th Cir. 1986); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985); *Calavco Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980).

The interpretation of *Gulf Oil* and *Piper* as requiring an alternative forum in which all defendants are amenable to process prior to balancing of public and private interests is a reasonable one. Convenience and economy to the parties and the courts provide the justification for a court of proper jurisdiction and venue to refuse to exercise that jurisdiction. It is difficult to understand how the interests of convenience and economy are served when one defendant is dismissed to be sued in a foreign forum, but another, not amenable to process in that forum, remains.[8]

The Fifth Circuit's holding that the trial court did not abuse its discretion by refusing to perform a balancing of the various interests where only plaintiff's chosen forum provided a jurisdiction in which all claims against all defendants could be brought is in perfect harmony with the

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[8] Petitioner acknowledges this problem in its discussion of the Sixth Circuit's decision in *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985) Pet. p. 13-14. Although petitioner argues that the defendants not subject to the jurisdiction of the foreign court had a number of options on remand, (Pet. p. 14, n. 19) the appellate court made it clear that these defendants would consent to the jurisdiction of the foreign court or proceed to trial on the merits in the district court. *Id.* at 357.

jurisprudence interpreting *Gulf Oil* and *Piper.*[9]

Petitioner's predictions of dire consequences if the Fifth Circuit's decision is allowed to stand are meritless. *Forum non conveniens* is a discretionary doctrine exercised in the interests of justice. Courts remain free to fashion relief that will aid in the management of complex cases by declining to exercise their jurisdiction when that relief does not constitute an abuse of their discretion.

However, havoc would result were this Court to adopt Pan Am's reasoning and determinne that a court may dismiss an action whenever forum, stipulates to liability, and agree to pay all damage awards. Petitioner's position is calculated to make a defendant who is not amenable to suit in the foreign (and presumably to mover) forum a "superfluous" defendant. See Pet. p. 4, Pet. App. 5a & 41a.

This is exactly the approach rejected by the Sixth Circuit in *Watson*, 769 F.2d 354 at 357. *Watson* involved a products liability action against an Ohio drug manufacturer by foreign plaintiffs. Another case involving similar calims and stemming from the same multidistrict litigation had been dismissed on the basis of *forum non convveniens. Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984). In *Watson* individual employees of the manufacturing were added as defendants. Although the manufacturer consented to the jurisdiction of the foreign forum, it was

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[9] Petitioner's cite a number of cases for the proposition that amenability of third-party defendants to suit abroad is not a *per se* threshold requirement but only a circumstance to be weighed. Pet. p. 9, n. 10. However, in each of the cases cited the third-party defendant was not amenable to suit in the plaintiff's chosen forum but was subject to foreign forum's jurisdiction. The inability to implead a third party in the United States is a factor weighing against retention of jurisdiction. *Piper*, 454 U.S. at 259. none of the cited cases considered the invocation of the doctrine in a case where defendant was able implead other parties in plaintiff's chosen forum only.

not clear that the individual defendants were subject to that forum's jurisdiction. Despite this uncertainty, the trial court dismissed the claims as to all defendants finding that the manufacturer was the "primary" defendant and that plaintiffs would not be prejudiced even were they unable to pursue the individual defendants in the foreign court.

Plaintiffs appealed the dismissal of all claims arguing that the dismissal of their claims when some defendants were not amendable to suit in the foreign forum was an abuse of discretion. The Court found the district court's determination that the individual employees who were not amenable to suit in the foreign forum were not the "primary" defendant, in essence, abolished the threshold showing that defendant was amenable to trial in another forum prior to the galancing of interests, and reversed the court's dismissal of those claims. The case was remanded to allow the remaining defendant's to consent to the foreign court's jurisdiction or proceed to trial in the United States. As the court explained, ". . .the decision of the court below represents an impermissible intermingling of the threshold criteria with the subsequent balancing test." *Id.* at 357.[10]

Finally, petitioner asserts that consideration by this Court is necessary to reconcile a conflict between the Fifth Circuit's decision and that of the Sixth Circuit in *Watson.* A careful reading of the two decisions shows that the cases can be reconciled without this Court's intervention.

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[1] If a defendant is added solely to defeat a *forum non conveniens* dismissal, and the claim against him is without merit then he may seek relief by way of summary judgment or directed verdict not *forum non conveniens* dismissal. *See, Id.*

In *Watson* the Sixth Circuit determined that the district court had not abused its discretion in dismissing the plaintiffs' claim against the Ohio manufactuer who consented to the jurisdiction of the foreign forum. It did so perfunctorily, finding that the district court had adopted the identical procedures established by it in *Dowling*, an earlier related case involving the same issues. *Id.* at 356.

The focus of the Sixth Circuit's concern and the bulk of its opinion centered on the lower court's dismissal of the claims against two co-defendants who had not consented to the foreign forum's jurisdiction. The Court did not squarely address the issue dealt with by the Fifth Circuit herein. In fact, the panel cited with approval authority for the proposition that "*forum non conveniens* dismissal requires availability of an alternative forum possessing jurisdiction as to all parties." (Emphasis added by the Court). 769 F.2d at 357 citing 15 Federal Practices & Procedure, Wright, Miller & Cooper, sec. 3928 at 179 and *Calavco Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2nd Cir. 1980).[11]

*Watson* did not involve a defendant such as the United States as to whom jurisdiction lies exclusively with the district courts of this country. The Court unlike the district court and the Fifth Circuit, did not have to address the *forum non conveniens* decision, where it was certain that dismissal would not have resolved the matter.[12] Had

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[11] The Fifth Circuit had no problem reconciling *Watson* and cited it, with other authority, in its *en banc* opinion for the proposition that the *forum non conveniens* doctrine presupposes an altermative forum where all defendants are amenable to process. 821 F.2d at 1164.

[12] Although the Sixth Circuit acknowledges that the remaining defendants might not consent to the jurisdiction of the foreign court, it seems clear from excerpts of the trial court's opinion that the defendants were arguing that the foreign forum could exercise jurisdiction over them. 679 F.2d at 357. For this reason, the Court may have assumed that they would be willing to consent to jurisdiction in order to have the claims against them dismissed.

the trial court herein granted the dismissal of the claim against Pan Am as requested the claims against the government would have remained.

2. The resolution of the conflict between the Fifth and Second Circuits and the District of Columbia Circuit with regard to the effort of an air carriers failure to comply with the notice requirements of the Montreal Agreeement is irrelevant to the outcome of the case before this Court where there are valid judgments against the the united States, whose liability is not limited by the Warsaw Convention.

The Warsaw Convention addresses the relationship between an air carrier and its international passangers. One provision of the treaty limits an air carrier's liability for death or injury to $8,300.00. It was modified by the Montreal Agreement, and, among other changes, the limitation of the carrier's liability for injury or death was raised to a maximum of $75,000.00.

Because the limitation of liability notice on the tickets issued in these cases was not in 10-point type the trial court found that Pan Am had failed to comply with the notice requirement provision of the Montreal Agreement, and was not entitled to limit its liability to $75,000. The Fifth Circuit affirmed this decision, adopting the rationale of the Second Circuit in a case dealing with the same issue, *In re: Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (LOT).

Petitioner points to a conflict between the decisions of the Fifth and Second Circuits and that of the District of Columbia Circuit, *In re: Korean Air Lines Disaster of*

*September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (KAL), adopting the decision of the district court in KAL, 664 F.Supp. 1463 (D.D.C. 1985).

Pan Am contends that the Fifth and Second Circuit decisions imposing a sanction for an air carrier's failure to comply with the specific notice requirement of the Montreal Agreement fail to address the meaning of certain language in the Warsaw Convention. Pet. p. 17. For this reason, it contends that the District of Columbia Circuit correctly rejected the LOT rationale and concluded that the carrier's limitation of liability is not extinguished by failure to comply with Montreal Agreement requirements.[13] Pet. p. 17, 18.

The District of Columbia adopted the opinion of the district court that ignores a line of federal jurisprudence addressing the issue of notice following the United States' ratification of the Warsaw Convention. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 85 (2d Cir.) *cert. denied*, 382 U.S. 816 (1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Lisi v. Alitalia-Linie Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966) *aff'd.* 390 U.S. 455, *reh'g. denied* 391 U.S. 929 (1968).

American courts were quite concerned that adequate notice of the limitation of the carrier's liability be provided to the international traveler. It was against this background that the Montreal Agreement, an eleventh hour effort to circumvent this country's withdrawal from the Warsaw Convention, was formulated. *See, LOT*, 705 F.2d at 88; owenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 594-596

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[13] Following the KAL rationale would allow an air carrier to ignore the specific notice requirements of the Montreal Agreement with impunity. *See*, 644 F.Supp. 1463 at 1466, 1475-1476.

(1967). The Agreement addressed the concerns of the treaty's critics, including the courts' concerns regarding "adequate" notice. It sets out certain requirements for the notice, including a provision that the it be printed in "type at least as large as 10-point modern type." Pet. App. 112a. Pan Am did not comply with the notice requirements specified by the Agreement, and the Fifth Circuit correctly affirmed the district court's denial of the liability limitation.

Neither the Warsaw Convention not the Montreal Agreement affects the liability of the united States in this case, and full damages may be recovered from the government. Granting of the writ and reversal of the Fifth Circuit's affirmance of the denial of the limitation to Pan Am would have no effect in this case.[14] A conflict between two Circuits does not require that *certiorari* be granted where, as here, the resolution of the conflict is irrelevant to the ultimate outcome of the case before the Court.

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[14]This is not a case presenting the mere possiblity of future mootness as suggested by Petitioner. See Pet. p. 19, n. 26.

## CONCLUSION

A writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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